IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECALL DUNLEAVY, an unincorporated association, Plaintiff, v. STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, DIRECTOR, STATE OF ALASKA, DIVISION OF ELECTIONS, Defendants.	Case No. 3AN-19-10903 CI
STAND TALL WITH MIKE, an independent expenditure group, Intervenor.	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Recall Dunleavy moves for summary judgment because, as a matter of law, its recall application states proper grounds and the Division of Elections erred in rejecting the application. By refusing to certify the recall application, the Division and its Director, Gail Fenumiai, (collectively "Defendants") wrongfully denied the citizens of Alaska the opportunity to lawfully exercise their fundamental right to petition for the recall of the Governor, as guaranteed by article XI, section 8 of the Alaska Constitution.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

I. BACKGROUND[1]

On September 5, 2019, with the signatures of 46,405 qualified Alaskans, Recall Dunleavy filed its application with the Division of Elections to recall Governor Michael J. Dunleavy. The application alleges three legal grounds for recall authorized by AS 15.45.510—neglect of duties, incompetence, and lack of fitness—each of which applies to the following actions by the Governor:

1. Governor Dunleavy violated Alaska law by refusing to appoint a judge to the Palmer Superior Court within 45 days of receiving nominations.

2. Governor Dunleavy violated Alaska Law and the Constitution, and misused state funds by unlawfully and without proper disclosure, authorizing and allowing the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers making partisan statements about political opponents and supporters.

3. Governor Dunleavy violated separation-of-powers by improperly using the line-item veto to: (a) attack the judiciary and the rule of law; and (b) preclude the legislature from upholding its constitutional Health, Education and Welfare responsibilities.

4. Governor Dunleavy acted incompetently when he mistakenly vetoed approximately $18 million more than he told the legislature in official communications he intended to strike. Uncorrected, the error would cause the state to lose over $40 million in additional federal Medicaid funds.[2]

---

[1] This motion is supported by the Affidavit of Scott M. Kendall. All references to exhibits in this motion are to the exhibits in the Kendall Affidavit. The affidavit and exhibits are submitted to provide context as to what the Governor understood was at issue in each allegation of the application.

[2] Statement of Grounds (emphases and citations omitted) (Exhibit 1).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

The Director of the Division of Elections must certify a recall application pursuant to AS 15.45.550 unless she determines that: (1) "the application is not substantially in the required form;" (2) the application is filed either too early or too late in an elected official's term; (3) "the person named . . . is not subject to recall;" or (4) there are an insufficient number of signers included in the application. Defendants—relying on the opinion of Attorney General Kevin Clarkson—rejected the application on November 4, 2019, for failing to comply with only the first of these requirements: not being substantially in the required form because it allegedly states insufficient factual and legal grounds for recall.[3]

Alaska Statute 15.45.720 provides that "[a]ny person aggrieved by a determination made by the director under AS 15.45.470—15.45.710 may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of determination was given." Plaintiff timely filed this action seeking review of the Division's rejection of its application.

---

[3] *See* Letter from Att'y Gen. Kevin G. Clarkson to Gail Fenumiai, Dir. of Elections, *Review of Application for Recall of Governor Michael J. Dunleavy*, at 1 (Nov. 4, 2019) [hereinafter Att'y Gen. Clarkson Op.] (Exhibit 2); Letter from Gail Fenumiai, Dir. of Elections, to Joe Usibelli Sr., Recall Comm. Member (Nov. 4, 2019) (Exhibit 3). The sitting Attorney General authored the opinion in this case, in contrast to past practice of having independent counsel make a legal sufficiency determination for a recall application against a sitting Governor or Lieutenant Governor. *See* Letter from Assistant Att'y Gen. Michael A. Barnhill to Laura A. Glaiser, Dir. of Elections, *Re: Review of Application for Recall of Senator Ben Stevens*, 2005 WL 2300397, at *8 (Sept. 7, 2005) [hereinafter Stevens Recall Op.] ("[T]he Department of Law has retained independent counsel to advise the Division in the Hickel/Coghill and Ogan recalls. Outside counsel rendered opinions in both cases." (citations omitted)).

II. LEGAL FRAMEWORK AND STANDARD OF REVIEW

As explained below, because Plaintiff's recall application complies with all constitutional and statutory requirements, it should have been certified as a matter of law and Plaintiff is entitled to summary judgment pursuant to Alaska Civil Rule 56(c).[4]

A. Law Governing Review And Sufficiency Of A Recall Petition

In evaluating the legal sufficiency of an application, courts look to the grounds for recall on which the application relies. This analysis is strictly legal because the Division Director—who is tasked with certifying or denying the recall application—*must* assume all factual allegations in a recall summary are true.[5] Courts apply an "independent judgment" standard to issues of law and do not defer to the Division's decision.[6] Thus, the "court is 'in a position similar to a court ruling on a motion to dismiss a complaint for failure to state a claim . . . [and it] must [therefore] take the allegations as true[.]' "[7] "If [an allegation of fact] is not true, the [officials] may say so in their rebuttals."[8] It is for the

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

4 *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 516-21 (Alaska 2014) (holding that summary judgment is appropriate when there are no genuine issues of material fact and the case can be decided as a matter of law).

5 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 300 n.18 (Alaska 1984).

6 *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (citing *Seybert v. Alsworth*, 367 P.3d 32, 36 (Alaska 2016)).

7 *Von Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1059 (Alaska 1995) (first and third alterations in original) (quoting *Meiners*, 687 P.2d at 300 n.18).

8 *Meiners*, 687 P.2d at 301; *see generally* Stevens Recall Op., 2005 WL 2300397.

voters to decide whether those facts are an accurate basis for the claim and whether they wish to recall the official.[9]

The Alaska Constitution expressly guarantees the people the right to recall public officials. Article XI, section 8 provides:

> All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.

As the Alaska Supreme Court explained in *Meiners v. Bering Strait School District*, across the country, the shape of the voters' right to recall officials falls on a spectrum.[10] At one end, some states regard recall as an inherently political process where no grounds are needed; at the other end, some states regard recall as an extraordinary remedy where extreme cause is needed and the grounds are construed narrowly.[11] Alaska adopted "a middle ground."[12] The Alaska Constitution does not require cause, and the drafters left the task of further defining the grounds for recall to the legislature.[13] The legislature enacted AS 15.45.510—unchanged since 1960—which establishes four grounds for recall of state officials: "(1) lack of fitness, (2) incompetence, (3) neglect of duties, or (4) corruption."

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

9 *Meiners*, 687 P.2d at 300 n.18 ("We emphasize that it is not our role, but rather that of the voters, to assess the truth or falsity of the allegations in the petition."); *see also Unger v. Horn*, 732 P.2d 1275, 1277 (Kan. 1987).

10 *Meiners*, 687 P.2d at 294.

11 *Id.*

12 *Id.*

13 *Id.* at 295.

The first three are applicable in this case.[14] There is limited precedent in Alaska addressing the grounds for recall, and all of the existing case law is addressed below.

B. General Principles Of Statutory Interpretation

The first task for the court is to interpret the three statutory grounds for recall. Alaska's courts start "with the text and its plain meaning."[15] "When 'interpreting a statute, [courts must] consider its language, its purpose, and its legislative history, in an attempt to "give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others." ' "[16] "In the absence of a [statutory] definition, [courts] construe statutory terms according to their common meaning[;] dictionaries 'provide a useful starting point' for this exercise."[17]

C. Principles Governing Interpretation Of Recall Statutes

Because recall is a fundamental part of our political process, the "statutes relating to . . . recall, like those relating to the initiative and referendum, 'should be liberally construed so that "the people [are] permitted to vote and express their will . . . ." ' "[18] "The

---

[14] The grounds for recall of municipal officers are similar, but worded slightly differently: "misconduct in office, incompetence, or failure to perform prescribed duties." AS 29.26.250. The Alaska Supreme Court decisions on recall to date concern municipal recall statutes, but those cases are relevant because the constitutional provision for recall is the same for all officials and the statutory grounds are similar.

[15] *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019) (citing *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012)).

[16] *Id.* (quoting *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003)).

[17] *Alaska Pub. Defender Agency v. Superior Court*, 450 P.3d 246, 253 (Alaska 2019) (first and third alterations in original) (quoting *Alaska Ass'n of Naturopathic Physicians v. State, Dep't of Commerce, Cmty. & Econ. Dev.*, 414 P.3d 630, 635 (Alaska 2018)).

[18] *Meiners*, 687 P.2d at 296 (second and third alterations in original) (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)); *see also Unger v. Horn*, 732 P.2d 1275, 1277 (Kan. 1987) ("Where a state constitutional provision provides for the recall of public officials, recall is

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute."[19]

Applying these principles of construction, the meaning of the three grounds for recall at issue in this case are easily understood. If this court finds any individual charge in the petition does not state a valid ground for recall, that charge should be severed from the recall petition, and "those charges which are sufficient to meet the statute must be set forth on the ballot in full, as contained in the petition, without revision."[20]

D. Grounds For Recall

1. Lack of fitness

The plain meaning of "unfit" is "unsuitable" or "inappropriate."[21] In *Valley Residents for a Citizen Legislature v. State*, then-Superior Court Judge Sharon Gleason defined "lack of fitness," as used in the recall statute, "as unsuitability for office

---

viewed as a fundamental right which the people have reserved to themselves. When the power of recall is a fundamental right, statutes governing the exercise of the power are to be liberally construed in favor of the ability to exercise it, and any limitations on that power must be strictly construed." (citing 63A AM. JUR.2D. *Public Officers and Employees* § 190)).

[19] *Meiners*, 687 P.2d at 296 (citing *Hazelwood v. Saul*, 619 P.2d 499, 500-01 (Colo. 1980); *Westpy v. Burnett*, 197 A.2d 400, 404 (N.J. Super. Ct. App. Div. 1964)); *see id.* at 295-96 ("In construing these [recall] statutes one must keep in mind that . . . recall petitions will frequently be initiated by voters of limited means in districts of small population in remote parts of the state. If we were to interpret the statutes in so strict a manner that a petition prepared and circulated without the detailed advice of a lawyer would have no practical chance of qualifying for the ballot, we would candidly have to recognize that the effect of our decision would be virtually to negate the recall process for citizens of small communities . . . in rural Alaska.").

[20] *Id.* at 303.

[21] *See Fit*, BLACK'S LAW DICTIONARY (4th ed. 1957) ("Suitable or appropriate. Conformable to a duty." (citation omitted)) (Appendix A). Recall Dunleavy relies on the 1957 edition of Black's Law Dictionary because AS 15.45.510 was codified in 1960. Legal authorities that may not be easily found are appended to this motion. *See* Appendices A-G.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

demonstrated by specific facts related to the recall target's conduct in office."[22] This definition tracks the dictionary definitions and common use and understanding of the words of the statute, as well as a long line of Attorney General opinions relating to the recall of state officials.[23] And when faced with an opportunity to opine on the definitions of "fitness" and "incompetence," the Alaska Supreme Court said: "there is little this court can add to the common definitions of those terms to assist recall campaigners or the Director of Elections in deciding the legal sufficiency of future petitions."[24]

Attorney General Clarkson's recommendation that the Division of Elections reject Plaintiff's recall application ignores all of the prior decisions and opinions addressing this

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

22 Order Regarding Pending Motions, 3AN-04-06827CI, at 10 (Alaska Super. Aug. 24, 2004) (Appendix B). Likewise, then-Superior Court Judge Craig Stowers applied the same standard in *Citizens for Ethical Government v. State*. *See* Transcript of Record at 5-6, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) ("[T]he definitions . . . were taken from a prior case, . . . *Valley Residents* . . . [which] defined lack of fitness to be 'unsuitability for office demonstrated by specific facts related to the recall target's conduct in office . . . .' ") (Appendix C). Similarly, Judge Richard Savell looked to Black's Law Dictionary to define "unfit" as "[u]nsuitable; incompetent; not adapted or qualified for a particular use or service; having no fitness." *Coghill v. Rollins*, Memorandum Decision, 4FA-92-01728CI, at 23 (Alaska Super. Sept. 14, 1993) (quoting *Unfit*, BLACK'S LAW DICTIONARY (6th ed. 1990)) (Appendix D).

23 *See, e.g.*, Letter from Assistant Att'y Gen. Elizabeth M. Bakalar to Gail Fenumiai, Dir. of Elections, *Re: Lindsey Holmes Recall Application*, 2013 WL 6593253, at *8-9 (Dec. 6, 2013) (relying on past precedent to define "lack of fitness" as "unsuitability for office"); Stevens Recall Op., 2005 WL 2300397, at *13-14 (looking to past precedent to primarily define lack of fitness as "unsuitability for office demonstrated by specific facts related to the recall target's conduct in office" (quoting *Valley Residents*, Order Regarding Pending Motions, 3AN-04-06827CI, at 10 (Alaska Super. Aug. 24, 2004) (Appendix B))); Letter from John M. Sedor to Laura A. Glaiser, Dir. of Elections, *Legal Review of Recall Application Re: Senator Ogan*, at 20-21 (Apr. 8, 2004) [hereinafter Ogan Op.] (interpreting " 'lack of fitness' . . . as referring to conduct in office showing the office holder to be unsuitable through factual detail sufficient to enable the public to understand the charge") (Appendix E).

24 *Coghill v. Rollins*, Memorandum Opinion and Judgment, No. S-6108, at 5-6 (Alaska Apr. 12, 1995) ("The question of what actions constitute 'incompetence' or 'unfitness' under AS 15.45.510 is of considerable importance. However, in the context of a matter which is no longer in dispute, there is little this court can add to the common definitions of those terms to assist

ground, and instead suggests a brand new definition of lack of fitness based on mental or physical ability.[25] There is no basis in Alaska law for this new definition, nor is it based on a common understanding of "fitness" for elected officials. Attorney General Clarkson's reliance on the definition of "unfitness" from other statutes runs contrary to previous opinions on recall, which call reference to other statutes "a problematic interpretative method because it involves relatively elaborate legal research."[26] Recall applications are intended to be easy for laypeople to prepare without lawyer assistance.[27]

2. Incompetence

The plain meaning of "incompetence" overlaps with "lack of fitness." Both concepts include a person "not [being] legally qualified" or "unsuitable for a particular

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

recall campaigners or the Director of Elections in deciding the legal sufficiency of future petitions. There is consequently no compelling public reason why we should issue an advisory opinion in this matter." (citing *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985); *Brandon v. Dep't of Corr.*, 865 P.2d 87, 92 n.6 (Alaska 1993))) (unpublished) (Appendix F).

[25] *See* Att'y Gen. Clarkson Op. at 15-16 (Exhibit 2).

[26] *See* Ogan Op. at 15-16 ("One could try to define the four statutory grounds for recall through reference to unrelated statutes. While this might be helpful, it is a problematic interpretive method because it involves relatively elaborate legal research. Interpretation of the grounds for recall based on such research might require detailed legal advice and thereby render recall inaccessible to a broad spectrum of Alaskans, *a result to be avoided*." (emphasis added) (footnote omitted) (citing *Meiners*, 687 P.2d at 295-96)) (Appendix E).

[27] *Meiners*, 687 P.2d at 301.

purpose."[28] But the common understanding of "incompetence" that is different than "unfit" is "lacking the qualities needed for effective action" or "unable to function properly."[29]

Only once has an Alaska court reviewed the legal sufficiency of an allegation of "incompetence" in the context of an attempt to recall a state official. In *Coghill v. Rollins*, Superior Court Judge Richard Savell concluded that the appropriate definition of "incompetence" in the context of an attempted recall of the Lieutenant Governor was "a lack of ability to perform the official's required duties."[30] In that case, Judge Savell found that the allegation that the Lieutenant Governor, who oversees elections, was unfamiliar with Alaska's election code stated a valid ground for incompetence that should go to the voters.[31] Again, the Alaska Supreme Court said it had nothing more to add to the common

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

[28] *Compare Incompetent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incompetent (last visited Nov. 4, 2019) (defining "incompetent" as "not legally qualified" and "inadequate to or unsuitable for a particular purpose"), *and Incompetency*, BLACK'S LAW DICTIONARY (4th ed. 1957) ("Lack of ability, legal qualification, or fitness to discharge the required duty.") (Appendix A), *with Fit*, BLACK'S LAW DICTIONARY (4th ed. 1957) ("Suitable or appropriate.") (Appendix A).

[29] *Incompetent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incompetent (last visited Nov. 4, 2019) (definitions 3a and 3b).

[30] Memorandum Decision, 4FA-92-01728CI, at 21 (Alaska Super. Sept. 14, 1993) (Appendix D). Kansas previously listed "incompetence" as a statutory ground for recall. *See* former Kansas Statutes 25-4302 ("Grounds for recall are conviction of a felony, misconduct in office, *incompetence or failure to perform duties prescribed by law.*" (emphasis added)). In *Reynolds v. Figge*, the Kansas Court of Appeals rejected using the definition of incompetency from other contexts—like guardianship—and opted to instead rely on Black's Law Dictionary. *See* 19 P.3d 193, 201 (Kan. App. 2001) (quoting *Incompetency*, BLACK'S LAW DICTIONARY (6th ed. 1990)) ("Appellants' argument that the definitions of incompetency provided in [guardianship statutes] should be applied in the instant case is devoid of authority and is fatally flawed. . . . As a result, we are unwilling to adopt [A]ppellants' narrow definition of incompetency."); *see also Cline v. Tittel*, 891 P.2d 1137, 1139, 1142-43 (Kan. App. 1995) (permitting a recall based on incompetence to go forward for, among other things, ignoring "the plainly expressed desire of his constituents").

[31] *Coghill*, Memorandum Decision, 4FA-92-01728CI, at 22 (Alaska Super. Sept. 14, 1993) (Appendix D). This definition was also followed by an Attorney General opinion relating to the

definition of this term, and declined to address this issue in the moot appeal of Judge Savell's order.[32]

Attorney General Clarkson's recommendation that the Division of Elections reject Plaintiff's recall application pays lip service to prior decisions and opinions, but then suggests a far more narrow definition of incompetence than is found in Alaska's recall law; the Attorney General adds an unwarranted gloss to the accepted standard, changing it to require a "lack[of] sufficient knowledge, skill or professional judgment."[33] The Attorney General imported this language from a specialized statute that has nothing to do with recall at all, the Alaska Business and Professions Code.[34] The standard the Attorney General used does not reflect the common understanding of "incompetence," does not have any basis in recall law, and was improperly cobbled together and applied.[35]

3. Neglect of duties

The plain meaning of "duty" is "obligatory tasks, conduct, service, or functions that arise from one's position."[36] In *Valley Residents*, Judge Gleason accepted and used the

---

recall of a state official. *See* Letter from Assistant Att'y Gen. Elizabeth M. Bakalar to Gail Fenumiai, Dir. of Elections, *Re: Review of Application for Recall of House Representative Kyle Johansen*, 2011 WL 5848617, at *11 (Oct. 3, 2011) [hereinafter Johansen Recall Op.] (applying the definition used in *Coghill v. Rollins*).

32 *See Coghill v. Rollins*, Memorandum Opinion and Judgment, No. S-6108, at 5-6 (Alaska Apr. 12, 1995) (unpublished) (Appendix F).

33 Att'y Gen. Clarkson Op. at 14 (Exhibit 2).

34 *See id.* (Exhibit 2).

35 *See* Ogan Op. at 15-16 (explaining how defining the grounds for recall "through reference to unrelated statutes" is "a problematic interpretive method") (Appendix E).

36 *Duty*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/duty (last visited Nov. 4, 2019); *see also Duty*, BLACK'S LAW DICTIONARY (4th ed. 1957) ("A human action which is exactly conformable to the laws which require us to obey them. . . . An obligation to do a thing. . . . But in practice it is commonly reserved as the designation of those obligations of

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

state's proposed definition of "neglect of duty" as "the nonperformance of a duty of office established by applicable law," in a case where a state senator's compliance with the Legislative Ethics Act was at issue.[37] The common understanding of "neglect of duties" also encompasses a failure to do any service or function required by the office, even if not explicitly set forth in the law. Although an allegation that the Governor failed to do something expressly required by law clearly sets forth a neglect of duty ground, the Governor is also required to undertake many "obligatory tasks, conduct, service, or functions" that are not spelled out in the Alaska Constitution or in statutes.[38] It is up to the voters to decide whether a particular failure to act constitutes a neglect of duty sufficient to warrant removal from office.[39]

Attorney General Clarkson's recommendation that the Division of Elections reject Plaintiff's recall application again adopts and uses a novel definition for "neglect of duties," one that ignores all prior Alaska case law and authority.[40] The Attorney General asserts that the citizens of Alaska can recall elected officials only for "serious and repeated failures to perform substantive essential duties."[41] He also introduces new "substantial

---

performance, care, or observance which rest upon a person in an official or fiduciary capacity[.]" (citations omitted)) (Appendix A).

37 Order Regarding Pending Motions, 3AN-04-06827CI, at 9 (Alaska Super. Aug. 24, 2004) (Appendix B); *see also* Johansen Recall Op., 2011 WL 5848617, at *12 (relying on the definition used in *Valley Residents*).

38 *Duty*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/duty (last visited Nov. 4, 2019).

39 *Meiners*, 687 P.2d at 301 ("Again, it is the responsibility of the voters to make their decision in light of the charges and rebuttals.").

40 *See* Att'y Gen. Clarkson Op. at 11-13 (Exhibit 2).

41 *Id.* at 12.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

compliance" and intentionality factors, arguing that elected officials should be able to violate the law and yet be immune from recall if the violation was inconsequential or unintentional.[42] Not only is this new standard found nowhere in recall law, it "wrap[s] the recall process in such a tight legal straitjacket" so that virtually no elected official could ever face recall for neglect of duties.[43]

E. Particularity Requirement

Alaska Statute 15.45.500(2) requires that "the grounds for recall [be] described in particular in not more than 200 words." Although the Alaska Supreme Court has not reviewed the particularity requirement in the context of a recall of a state official, two decisions interpret and apply a similar requirement in the municipal recall context.

The Alaska Supreme Court confirmed in both *Meiners* and *von Stauffenberg* that the particularity requirement is effectively a notice pleading standard with the "purpose of . . . giv[ing] the officeholder a fair opportunity to defend his conduct . . . ."[44] Thus, assuming all alleged facts to be true, and applying the Civil Rule 12 legal sufficiency standard of review, this court must consider whether a particular alleged act "is not [so] impermissibly vague" that the official cannot respond.[45] In *Meiners*—when municipal

---

42 *Id.* at 12-13.

43 *Meiners*, 687 P.2d at 301.

44 *Von Stauffenberg*, 903 P.2d at 1060 (quoting *Meiners*, 687 P.2d at 302).

45 *Meiners*, 687 P.2d at 302 ("The purpose of the requirement of particularity is to give the officeholder a fair opportunity to defend his conduct . . . . Read in light of these statutes, the petition is not impermissibly vague."). Kansas has an identical statutory particularity requirement. Kan. Stat. Ann. § 25-4320(a)(2). In *Unger v. Horn*, the Kansas Supreme Court came to the same conclusion as the Alaska Supreme Court did in *Meiners*, holding that "[t]he grounds stated in a recall petition must be specific enough to allow the official an opportunity to prepare a statement in justification of his or her conduct in office." 732 P.2d 1275, 1281 (Kan. 1987); *see also Herron*

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

recall proponents were not limited to 200 words and specific instances had to be alleged[46]—the Court concluded that two of the three allegations satisfied this requirement, including the allegations "that the board members failed to perform their prescribed duty to 'employ' a superintendent" and that other conduct violated "state public records and public meetings laws."[47] Today's statute now limits recall applications to 200 words and no longer requires that specific instances be alleged.[48]

The *Meiners* Court also noted that, in the context of the particularity requirement, the allegations cannot allege a violation of "non-existent laws."[49] In *von Stauffenberg*, the Court applied this rule, determining that "the petition allege[d] violation of totally non-existent laws."[50] Because the school board members, whose recall was sought, were entitled to go into executive session, and doing so did not violate the open meetings act,

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

v. McClanahan, 625 P.2d 707, 711 (Wash. App. 1981) (reasoning that a purpose of Washington's particularity requirement "is to ensure that the official being charged is notified of the precise act or acts of alleged misconduct so as to enable him to make a meaningful public response to the merits of each charge").

[46] *See* former AS 29.28.150(a)(3) (1984) (requiring "a statement of grounds of the recall stated with particularity as to specific instances" without any word limit (Appendix G); *see also Meiners*, 687 P.2d at 291-92 (restating the statement of grounds, which contains over 500 words).

[47] *Meiners*, 687 P.2d at 300-02.

[48] *Compare* AS 15.45.500(2) ("[T]he grounds for recall [must be] described in particular *in not more than 200 words*[.]" (emphasis added)), *with* former AS 29.28.150(a)(3) ("[T]he grounds of the recall [must be] stated with particularity *as to specific instances*." (emphasis added)) (Appendix G).

[49] *Meiners*, 687 P.2d at 301.

[50] *Von Stauffenberg*, 903 P.2d at 1060 & n.13 (citing *Meiners*, 687 P.2d at 301). Judge Stowers also applied this rule in the Steven's recall case. *See* Transcript of Record at 9-11, *Citizens for Ethical Gov't v. State*, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) (concluding there are no legal grounds for recall because it is "perfectly legal conduct" for a sitting legislator to be a paid consultant) (Appendix C).

the recall petition alleging illegality failed to allege a ground with particularity that could go to the voters.[51]

In recommending that the Division of Elections reject the recall application, Attorney General Clarkson impermissibly changes the focus of the particularity requirement, claiming that it requires the grounds to be "factually . . . sufficient."[52] Contrary to recall case law and all prior Attorney General opinions, the Attorney General now asserts that recall petitions must "specify some detail as to how the office holder personally committed or was personally responsible for the alleged conduct . . . ."[53] This is not a correct statement of the law in Alaska, nor does it accurately state the particularity requirement. All facts alleged in the recall application are presumed to be true. Plaintiff's application expressly alleges that Governor Dunleavy committed five specific acts that are grounds for recall. Any argument that an act was done by a subordinate without the Governor's knowledge is an argument that he can make to the voters.[54] But, as discussed

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

51 *Von Stauffenberg*, 903 P.2d at 1059-60.

52 *See* Att'y Gen. Clarkson Op. at 6-7 (Exhibit 2).

53 *Id.* at 7 (Exhibit 2). The Attorney General cites a Washington case for this proposition, but he misstates the holding of that case. *See id.* at 7 n.25. Washington *does* allow the recall of officials in some cases based on subordinates' actions; it just needs to be within the targeted officials' "knowledge or ability to direct" the subordinate. *See In re Recall of Reed*, 124 P.3d 279, 281-82 (Wash. 2005) ("[T]his court has noted that there is 'no authority for the proposition that a public official may be recalled for the act of a subordinate done without the official's knowledge or direction.' This conclusion reflects an underlying premise that an official cannot be held responsible for conduct beyond his knowledge *or ability to direct*." (emphasis added) (citation omitted) (quoting *In re Recall of Morrisette*, 756 P.2d 1318, 1320 (Wash. 1988))).

54 *See Meiners*, 687 P.2d at 301 ("If [the statement of fact] is not true, the board members may say so in their rebuttals. Similarly, if they believe that it is a mischaracterization of what the Department of Education actually did, or they think that there are circumstances in mitigation . . . it is open to the board members to make their positions known by way of rebuttal.").

in more detail below, there is no question that all grounds are alleged in the petition application with sufficient particularity such that the Governor is on notice regarding what actions are at issue in this case.

III. ARGUMENT

A. The Allegation That Governor Dunleavy Violated Alaska Law By Refusing To Appoint A Judge Within 45 Days Of Receiving Nominations Is A Legally Sufficient Ground For Recall.

1. Factual basis for this claim

The Alaska Constitution places considerable importance on the selection of judges.[55] Alaska's extensive application, interview, nomination, and appointment process strives to ensure that only the "most qualified" applicants are nominated for appointment

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

[55] Alaska Const. art. IV, § 5 ("The governor shall fill any vacancy in an office of supreme court justice or superior court judge by appointing one of two or more persons nominated by the judicial council."); Alaska Const. art. IV, § 8 (establishing the judicial council); *see* Walter L. Carpeneti & Brett Frazer, *Merit Selection of Judges in Alaska: The Judicial Council, The Independence of the Judiciary, and the Popular Will*, 35 ALASKA L. REV. 205, 206 (Alaska 2018) (explaining the judicial selection process, where the Alaska Judicial Council "focuses on merit" to " 'seek the best available timber' to send to the governor." (quoting Proceedings of the Alaska Constitutional Convention (PACC) at 594 (Dec. 9, 1955))); *see also id.* at 209-20 (discussing the framers' rationales and debates when creating Alaska's judicial nominee and appointment framework).

to the bench.[56] The framers of Alaska's Constitution created this enduring structure to ensure that merit, not politics, would guide Alaska's judicial selection process.[57]

The Alaska Judicial Council ("the Council") announced two vacancies for the Palmer Superior Court in September 2018.[58] After processing and vetting 13 applications for the positions,[59] the Council nominated three candidates and delivered their names to Governor Dunleavy on February 4, 2019.[60]

Article IV, section 5 of the Alaska Constitution provides that "[t]he governor *shall* fill any vacancy in an office of . . . superior court judge by appointing one of two or more persons nominated by the judicial council."[61] Alaska Statute 22.10.100 codifies this duty and provides that "[t]he governor *shall* fill a vacancy or appoint a successor to fill an impending vacancy in the office of superior court judge *within 45 days* after receiving nominations from the judicial council, by appointing one of two or more persons nominated

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

56 *See* Alaska Judicial Council Bylaws art. I, § 1 (2013); Alaska Judicial Council Bylaws art. VII, § 4 (2013); *see also* Teri White Carns & Susie Mason Dosik, *Alaska's Merit Selection of Judges: The Council's Role, Past and Present*, 35 ALASKA L. REV. 177, 179, 182-85 (Alaska 2018) (discussing the creation and implementation of the "most qualified" standard for nominating judges).

57 Carpeneti & Frazer, *supra* note 55, at 207 ("An enduring concern of the majority of the [constitutional] delegates was injecting politics into the selection of judges." (citing PACC at 584, 589, 593-94 (Dec. 9, 1955))); *see id.* at 210 ("[D]elegates to the Constitutional Convention were uniformly concerned that party politics or special interests might pollute Alaska's judiciary." (citing PACC at 596, 598 (Dec. 9, 1955))).

58 Press Release, Alaska Judicial Council, Judicial Vacancy Announcements (Sept. 7, 2018), http://www.ajc.state.ak.us/selection/docs/pressreleases/pr_jan19vacancies_9-7-18.pdf.

59 Press Release, Alaska Judicial Council, Announcing Applicants (Oct. 15, 2018), http://www.ajc.state.ak.us/selection/docs/pressreleases/pr_jan19applicants_10-15-18.pdf.

60 Press Release, Alaska Judicial Council, Palmer Superior Court Judicial Vacancies Third Judicial District (Feb. 4, 2019), http://www.ajc.state.ak.us/selection/docs/pressreleases/pr_palmer_nominees_2-4-19.pdf.

61 Alaska Const. art. IV, § 5 (emphasis added).

by the council for each actual or impending vacancy."[62] Governor Dunleavy therefore had a statutory duty to fill both vacant Palmer Superior Court positions from the Council's list of nominees by March 21, 2019.[63]

Unlike every other Governor before him,[64] Governor Dunleavy refused to follow the law. Instead, while making four other judicial appointments on March 21, he left one of the two positions for the Palmer Superior Court unfilled.[65] Governor Dunleavy explained his reasons for not complying with the law in a press release and letter to the Council.[66] His letter stated that he "w[ould] not be selecting a second candidate" for the Palmer Superior Court because he believed that the full list of nominated candidates "d[id] not appear" "to be merit and qualifications based."[67] Governor Dunleavy then referenced a previous request from his office for "more information" so that he could "review and consider the Council's reasoning to determine whether additional qualified candidates could be nominated by the Council for this position."[68]

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

62 AS 22.10.100 (emphasis added).

63 *Id.*

64 Carpeneti & Frazer, *supra* note 55, at 220-21 & n.113 (discussing how, through 2018, "[n]o such effort[]" by a Governor to "bypass" the Council has been successful, including "the most serious case" in 2004 with then-Governor Frank Murkowski).

65 *See* Press Release, Governor Michael J. Dunleavy, Governor Announces Four New Judges, Declines to Fill Vacant Seat Without Additional Information from Judicial Council (Mar. 21, 2019), [hereinafter Governor Announces Four New Judges] https://gov.alaska.gov/newsroom/2019/03/21/governor-announces-four-new-judges-declines-to-fill-vacant-seat-without-additional-information-from-judicial-council/ (Exhibit 4).

66 Letter from Governor Michael J. Dunleavy to the Alaska Judicial Council (Mar. 20, 2019) [hereinafter Letter to the Council] (Exhibit 5); *see also* Governor Announces Four New Judges (Exhibit 4).

67 Letter to the Council (Exhibit 5). The Governor did not explain why he held this view or what it was based on.

68 *Id.* (Exhibit 5).

Governor Dunleavy issued another press release almost a week later on the still-unfilled Palmer Superior Court judicial position.[69] In that press release, he recounted a recent meeting with Chief Justice Joel Bolger, the *ex-officio* chair of the Council,[70] and provided a brand new explanation for his failure to appoint a second judge to the Palmer Superior Court:

> In declining to name a second nominee to the Palmer Superior Court, I announced my intention to better understand the judicial nomination process and to further clarify whether or not the Council was in fact upholding the merit and qualifications-based standard. My hope was to further review and consider the information before us and ensure this process was thoroughly understood by my office . . . . Based on my discussions with Chief Justice Bolger, my concerns have been satisfied. I expect to make an announcement on this matter in the near future.[71]

Governor Dunleavy did not make an appointment for the second Palmer Superior Court vacancy until April 17, 2019, 72 days after the Council forwarded its list of qualified nominees.[72]

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

69 Press Release, Governor Michael J. Dunleavy, Governor Comments on Judicial Nomination Process Following "Fruitful and Productive" Meeting with Chief Justice Bolger (Mar. 27, 2019) [hereinafter Governor Comments on Judicial Nomination Process], https://gov.alaska.gov/newsroom/2019/03/27/governor-comments-on-judicial-nomination-process-following-fruitful-and-productive-meeting-with-chief-justice-bolger/ (Exhibit 6).

70 *Id.* (Exhibit 6); *see* Alaska Const. art. IV, § 8 ("The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council.").

71 Governor Comments on Judicial Nomination Process (Exhibit 6).

72 Press Release, Governor Michael J. Dunleavy, Governor Fills Palmer Superior Court Seat (Apr. 17, 2019), https://gov.alaska.gov/newsroom/2019/04/17/governor-fills-palmer-superior-court-seat/.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

2. Governor Dunleavy's failure to appoint a superior court judge within the mandated timeframe constitutes neglect of duties.

Governor Dunleavy's refusal to appoint a Palmer Superior Court judge within the mandatory 45-day timeframe clearly violates the law and constitutes a neglect of duties.[73] Because the Governor's obligation to appoint a judge within 45 days of receipt of the nominees from the Judicial Council is a mandatory legal requirement that the Governor has sworn to uphold, his refusal to make the appointment unquestionably constitutes "nonperformance of a duty of office established by applicable law."[74]

Attorney General Clarkson's recommendation against certification concedes the Governor violated the law and that the particularity requirement is met, but argues: (1) only constitutional violations matter; (2) the deadline was a technical procedural requirement that the Governor could ignore; and (3) the violation had no consequence.[75] None of these defenses to violating the law has any merit or legal support.

The deadline in the statutes is not a technicality. It is an essential part of the appointments process that a coequal branch of government imposed to ensure that judicial vacancies are timely filled, with very limited political influence or pressure. The Governor's failure to meet the deadline clearly was not a mere oversight. To the contrary, Governor Dunleavy admits that he intentionally refused to respect and comply with the

---

73 AS 22.10.100.

74 *Valley Residents for a Citizen Legislature v. State*, Order Regarding Pending Motions, 3AN-04-06827CI, at 9 (Alaska Super. Aug. 24, 2004) (Appendix B).

75 *See* Att'y Gen. Clarkson Op. at 17-19 (Exhibit 2).

deadline.[76] His stated intent was to hold the appointment of a Palmer judge hostage in the hope of forcing the Council to give him preferred nominees and information to which he was not legally entitled. His refusal to uphold and follow the law was an abuse of power and an effort to inject into the judicial appointment process the political considerations that the Alaska Constitution and statutes have long aimed to preclude.

The Governor seems to believe he is bound by some laws, but not by others. If so, it is a baseless belief. He cannot arbitrarily pick and choose which laws to follow—he is "responsible for the faithful execution of the laws" under the Alaska Constitution.[77]

His violation of the law also is far from inconsequential. Politicizing the appointment process is not only unconstitutional, but it risks serious damage to a critical branch of government. Qualified applicants may decide not to apply for judicial positions because they are unwilling to submit to a process that converts Alaska's "merit-based" selection system into one based on political favor. The mere risk of becoming a pawn in a contrived battle between the Governor and the judiciary is enough to discourage well-qualified applicants from applying.

Based on the Governor's refusal to comply with the law and fulfill his duty to timely make the Palmer judicial appointment, the recall application alleges a legally sufficient basis for recall, and Defendants erred in denying certification on this ground.

---

[76] The Governor's letter to the Council stated unambiguously that he "w[ould] not be selecting a second candidate" for the Palmer Superior Court because he believed that the full list of nominated candidates "d[id] not appear" "to be merit and qualifications based." Letter to the Council (Exhibit 5).

[77] Alaska Const. art. III, § 16.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

3. Governor Dunleavy's failure to appoint a superior court judge within the mandated timeframe also demonstrates lack of fitness and incompetence.

Governor Dunleavy also demonstrated both "lack of fitness" for office and "incompetence" when he refused to appoint the second Palmer judge within the statutorily mandated timeframe. He contended that he needed additional information about the nominees and the selection process. But if he needed information about the selection process, it was readily available without delaying the appointment. The judicial selection process is codified in law, has been in existence since statehood, and is fully described on the Council's website. The Governor also has access to advice from the Attorney General and all the lawyers in the Department of Law. Any lack of information or understanding he may have had about the selection process in no way justifies violating the law.[78] To the contrary, ignoring the deadline based on a supposed need for information or a refusal to appoint from the Council's list shows an utter "lack of fitness" (that he is "unsuit[ed] for office") and "incompetence" (that he "lack[s] the qualities needed for effective action" and is "unable to function properly").[79]

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

78 *See* Letter to the Council (Exhibit 5); Governor Comments on Judicial Nomination Process (Exhibit 6).

79 *Valley Residents*, Order Regarding Pending Motions, 3AN-04-06827CI, at 9 (Alaska Super. Aug. 24, 2004) (Appendix B); *Incompetent*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incompetent (last visited Nov. 4, 2019); *see also Coghill v. Rollins*, Memorandum Decision, 4FA-92-01728CI, at 21 (Alaska Super. Sept. 14, 1993) (defining "incompetence" as "a lack of ability to perform the official's required duties") (Appendix D).

Plaintiff's application for recall alleges legally sufficient grounds for recall for failure to timely appoint a judge. The voters can find that this failure constitutes lack of fitness and incompetence.

B. The Allegation That Governor Dunleavy Violated The Executive Branch Ethics Act And Campaign Finance Laws By Using State Funds For Partisan Political Purposes States A Legally Sufficient Ground For Recall.

1. Factual basis for this claim

The application alleges as its second ground that Governor Dunleavy "allow[ed] the use of state funds for partisan purposes to purchase electronic advertisements and direct mailers."[80] It alleges his actions violated the Executive Branch Ethics Act ("Ethics Act"), Alaska's campaign finance laws, and article IX, section 6 of the Alaska Constitution.

Although the Attorney General asserts this is not factually specific enough,[81] this allegation easily meets the Alaska Supreme Court's specificity requirement: the use of state funds to purchase advertisements for partisan purposes is a very specific act—and it is always illegal for a state official to use state funds for partisan politicking. It cannot be disputed that the Governor is on notice regarding which political communications violated the law, and why.[82] The Governor has sufficient notice of the allegation and can admit or

---

80 Statement of Grounds (Exhibit 1).

81 Att'y Gen. Clarkson Op. at 20 (Exhibit 2).

82 This matter was an issue of public discussion in political blogs at the time. *See infra* at notes 102-103 and accompanying text. And Heather Hebdon, the Executive Director of the Alaska Public Offices Commission ("APOC"), the entity charged with enforcement of Alaska's campaign finance laws, contacted the Governor's Office after learning of the mailers to inform the Governor that the communications violated campaign finance law for, at a minimum, lacking the required "paid for by" disclosures. The fact that APOC ultimately decided to give the Governor a "free pass" on this violation does not mean it was not in fact a violation.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

deny doing it, as he can admit or deny spending funds without making disclosures required by APOC.

The discussion that follows provides additional detail, all based on public documents known to the Governor. It would have been impossible to provide this detail within the 200-word limit of the recall application. But even without this detail, there can be no plausible claim that, viewed in the light most favorable to the recall applicants, the application is impermissibly vague in alleging the Governor was involved in the purchase of advertisements with state money, his purpose was partisan, and the advertisements were therefore illegal.

a. Advertisements on Facebook pages

Shortly after his election, Governor Dunleavy set up and continues to run the standard, informational, state-sponsored Governor's Facebook page.[83] No legal issue is presented by this Facebook page or its content. But the Governor also opened three additional, issue-specific Facebook accounts, and used state funds to pay for what are unequivocally partisan online advertisements on these accounts. The expenditures of state funds on these political advertisements violated the law and are a valid basis for recall.

The first of these Facebook accounts is a page entitled "Restore the PFD" that exists to "[s]upport[] Governor Mike Dunleavy's efforts to Restore the PFD."[84] Although it is

---

[83] *See* Governor Mike Dunleavy (@GovDunleavy), FACEBOOK (created Nov. 8, 2018), https://www.facebook.com/GovDunleavy/ (last visited Nov. 4, 2019).

[84] *See* Restore the PFD (@RestorePFD), *About*, FACEBOOK, https://www.facebook.com/pg/RestorePFD/about/ (last visited Nov. 4, 2019) (Exhibit 7).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

characterized as a "[c]ommunity" page, the contact information directs site visitors to Governor Dunleavy's office number and his official government website.[85] To date, Governor Dunleavy has spent $18,902 in public funds on partisan advertising through this Facebook page.[86] The state-funded ads on this site include two attacking specific legislators who disagreed with the Governor:

- A video shows Senate President Cathy Giessel speaking against funding "a full PFD," accompanied by text stating: "Not every legislator agrees that Alaskans deserve a full PFD," followed by a statement urging people "to tell lawmakers you support a full PFD."[87]

- An ad attacks Representative Tammie Wilson, stating that "she wants to cut the PFD for future generations to pay for government," then tells people to call her office to say "there should be no change to the PFD without a vote of the people."[88]

A second Facebook page, entitled "Repeal SB91," exists to support "the Repeal of SB 91!"[89] No contact information besides Facebook Messenger is listed for this "[c]ommunity" page, although the State of Alaska's Social Media Policy Notice is listed in the page's "Company Overview."[90] Governor Dunleavy has spent $8,173 of public

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

85 *See id.* (listing "(907) 465-3500" and "http://www.gov.alaska.gov" as contact information) (Exhibit 7).

86 Restore the PFD (@RestorePFD), *Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=616481278789881 (last visited Nov. 4, 2019) (Exhibit 7).

87 Restore the PFD (@RestorePFD), *Senator Giessel on the PFD*, FACEBOOK (May 7, 2019), https://www.facebook.com/RestorePFD/videos/415826069240326/ (last visited Nov. 4, 2019).

88 Restore the PFD (RestorePFD), FACEBOOK (May 23, 2019), https://www.facebook.com/RestorePFD/photos/a.625577604546915/663360374101971/?type=3&theater (last visited Nov. 11, 2019) (Exhibit 7).

89 Repeal SB 91 (@MakeAlaskaSafe), *About*, FACEBOOK, https://www.facebook.com/pg/MakeAlaskaSafe/about/ (last visited Nov. 4, 2019) ("Alaskans for the Repeal of SB 91!") (Exhibit 8).

90 *Id.* (listing "http://doa.alaska.gov/resources/socialMediaPolicy.html") (Exhibit 8).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

funds on advertisements through this Facebook page to date, using campaign-style slogans while presenting them as state-sponsored nonpolitical advertisements.[91] The ads promote Governor Dunleavy personally, not just the position he espouses; for example: "Alaska is a much safer place now that Governor Mike Dunleavy has signed House Bill 49 and repealed the failed SB91."[92]

The third political Facebook page, entitled "Cap Government Spending," exists to support a specific constitutional amendment introduced by Governor Dunleavy—Senate Joint Resolution (SJR) 6[93]—which would create a new constitutional spending cap.[94] This "[c]ommunity" page lists Governor Dunleavy's official government website for its contact information.[95] Governor Dunleavy has so far spent $3,312 of public funds on advertising through this Facebook page.[96] The state-funded ads explicitly support Representatives Kelly Merrick and Sara Rasmussen, as well as then-Representative Josh Revak, because they favored SJR 6; the ads also promote petitions favorable to SJR 6 and help supporters

---

91 *See* Repeal SB91 (@MakeAlaskaSafe), *Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&q=Repeal%20SB91&view_all_page_id=613601695770470 (last visited Nov. 4, 2019) (indicating many advertisements are "Paid for by Governor Mike Dunleavy") (Exhibit 8).

92 *See id.* (last visited Nov. 4, 2019) (Exhibit 8).

93 *See* 2019 Senate Joint Resolution No. 6 (S.J.R. 6).

94 *See* Cap Government Spending (@CapSpending), *About*, FACEBOOK, https://www.facebook.com/pg/CapSpending/about/ (last visited Nov. 4, 2019) ("Cap Government Spending supports Governor Dunleavy's bill to create a straightforward, understandable, and effective limit on government growth.") (Exhibit 9).

95 *Id.* (listing "http://www.gov.alaska.gov") (Exhibit 9).

96 Cap Government Spending (@CapSpending), *Ad Library*, FACEBOOK, https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=US&view_all_page_id=2109316425853875 (last visited Nov. 11, 2019) ("Paid for by [the] Office of the Governor of Alaska.") (Exhibit 9).

send a form letter in support of SJR 6 to legislators.[97] Some of these paid advertisements ran on or after Representative Rasmussen and then-Representative Revak filed letters of intent with APOC to run for re-election in the 2020 state primary election.[98]

b. Physical Mailers

In addition to using Facebook pages to support legislators he favors and to attack those he opposes, Governor Dunleavy used state funds to print and distribute campaign-style literature supporting Senator Mia Costello and then-Representative Revak. The mailers were sent to Alaska voters in July 2019,[99] after Revak filed his letter of intent to run for re-election in the 2020 state primary with APOC.[100] These mailers asked voters to thank these elected officials for voting for positions that Governor Dunleavy favors (including "a full PFD," "a smaller budget," and "a smaller government"), but the mailers did not disclose who paid for them.[101] Governor Dunleavy's office has since admitted to spending "approximately" $3,500 in public funds on these political mailers.[102] As reported in a political blog as the time, APOC determined that the mailers violated the law and

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

97 *Id.* ("Thank [the three representatives listed] for voting to cut the budget and keep government spending in check. [He or she's] a fighter for a permanent fiscal plan. Email . . . or call [his or her] office . . . and say 'thank you'! [sic]") (Exhibit 9).

98 *See* Letter of Intent, Sara Rasmussen (submitted June 24, 2019) (Exhibit 10); Letter of Intent, Joshua C. Revak (submitted June 13, 2019) [hereinafter Revak Letter of Intent] (Exhibit 10).

99 Email from Matt Shuckerow, Press Sec'y, Office of Governor Michael J. Dunleavy, to Jeff Landfield (July 17, 2019, 6:52 PM) [hereinafter Shuckerow Email] (Exhibit 11).

100 *See* Revak Letter of Intent (Exhibit 10).

101 *See* Photographs of Physical Mailers (Exhibit 12).

102 Shuckerow Email (Exhibit 11); *see also* Jeff Landfield, *Gov. Dunleavy's Office Paid for Rep. Revak and Sen. Costello Mailers*, THE ALASKA LANDMINE (July 19, 2019) [hereinafter Landfield Post], https://alaskalandmine.com/landmines/gov-dunleavys-office-paid-for-rep-revak-and-sen-costello-mailers/.

advised the Governor that any such future mailers must include, at a minimum, a "paid for by" disclaimer.[103]

2. Governor Dunleavy's use of state funds for political activity violated the Executive Branch Ethics Act and Alaska's campaign finance laws.

The Ethics Act, which Governor Dunleavy must follow,[104] prohibits "the use of state funds, facilities, equipment, services, or another government asset or resource for partisan political purposes[.]"[105] Partisan political purposes "means having the intent to differentially benefit or harm a (i) candidate or potential candidate for elective office; or (ii) political party or group," but "does not include having the intent to benefit the public interest at large through the normal performance of official duties."[106] Applying these definitions, an executive branch official violates the Ethics Act by funding advertisements on websites or in mailers that are intended "to differentially benefit or harm" specific candidates, potential candidates, or political groups, instead of intending "to benefit the public interest at large."[107]

The content and nature of these state-paid advertisements expose their partisan purposes. Governor Dunleavy used state funds to pay for advertisements on three different

---

103 *See* Affidavit of Scott M. Kendall at 5-6 (Nov. 26, 2019); *see also* Landfield Post.

104 AS 39.52.910; *see also* Alaska Const. art. IX, § 6 ("No . . . appropriation of public money [shall be] made . . . except for a public purpose."); AS 39.52.010-.965; 9 Alaska Administrative Code (AAC) 52.010-.990.

105 AS 39.52.120(b)(6).

106 *Id.*

107 *See id.*; *see also* Memorandum from Daniel C. Wayne, Legislative Counsel, Legislative Affairs Agency, Div. of Legal & Research Servs., to Rep. Zack Fields, at 4 (May 20, 2019) ("[T]he use of public funds for a partisan political purpose is unconstitutional, and therefore not a normal performance of official duties.") (Exhibit 13).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Facebook accounts. These ads: (1) support or oppose specific sitting legislators, depending on whether they agreed with him on key issues; (2) tout his accomplishments; and (3) urge one-sided participation in the legislative process. The ads' self-promotion, targeted attacks on named legislators, and focused support of other legislators look like campaign ads because they are; this is clear partisan politicking.

For much the same reasons, the campaign-style mailers supporting then-Representative Revak and Senator Costello also violate the Ethics Act; the Governor used state funds to differentially benefit specific candidates or potential candidates.

The mailers and the Facebook ads supporting then-Representative Revak and Representative Rasmussen, who had already announced their plans to run for re-election, also violate Alaska's campaign finance laws. Alaska's campaign finance statutes require: (1) a "clear[]" identification of who "paid for" a communication;[108] (2) specific language distancing an independent group from a particular candidate;[109] and (3) prior registration with APOC.[110] The law also expressly prohibits the use of state funds "to influence the

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

108 AS 15.13.090(a) ("All communications *shall* be clearly identified by the words 'paid for by' followed by the name and address of the person paying for the communication." (emphasis added)).

109 AS 15.13.135(b) ("A person who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office . . . shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernable: This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.").

110 AS 15.13.050(a) ("Before making an expenditure in support of or in opposition to a candidate . . . , each person other than an individual shall register [with APOC.]").

outcome of the election of a candidate to a state or municipal office."[111]

Neither the mailers nor the Facebook ads "clearly" identified (or even attempted to identify) who paid for the communications,[112] or stated that the Governor was not acting on behalf of the candidate's campaign;[113] and the Governor did not register with APOC in advance of distributing these communications.[114]

The recall application states a valid ground for recall, because although the Governor may support candidates, he may not use state funds to do so,[115] and he may not otherwise violate the law.

3. Governor Dunleavy's violations of the Executive Branch Ethics Act and campaign finance laws constitute neglect of duty, unfitness for office, and incompetence.

The recall application's allegation of Governor Dunleavy's repeated violations of the Ethics Act and state campaign finance laws provides a legally sufficient ground for recall.

One of the Governor's most obvious duties is to follow the law. Repeated violations of the law therefore constitute neglect of that important duty and, as a result, the allegation in the recall petition states a valid ground for recall.[116]

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

111 *See* AS 15.13.145(a).
112 *See* AS 15.13.090.
113 *See* AS 15.13.135(b).
114 AS 15.13.050(a).
115 *See* AS 15.13.145(a).
116 *See Valley Residents for a Citizen Legislature v. State*, Order Regarding Pending Motions, 3AN-04-06827CI, at 9 (Alaska Super. Aug. 24, 2004) (accepting the state's definition for "neglect of duty" as being "the nonperformance of a duty of office established by applicable law.") (Appendix B).

Fitness for office likewise requires respect for and obedience to the law.[117] The Ethics Act and Alaska's campaign finance laws draw a clear line prohibiting the use of state funds for personal political purposes.[118] The campaign finance laws establish clear, specific disclosures requirements, which the Governor also repeatedly ignored. The allegation in the recall petition thus establishes "unfitness" as a second valid ground for recall.

Nevertheless, if the Governor claims he did not intend to violate the law or did not realize his actions violated the law, then his repeated violations of the Ethics Act and campaign finance laws establish his incompetence. The Governor has access to a broad range of legal advisors. APOC provides training and informal guidance. If Governor Dunleavy failed to avail himself of these resources and acted without seeking advice on how to comply with the law in areas he must know are carefully regulated to prevent abuse of power, then he demonstrated his incompetence—i.e., a "lack of ability to perform [his] required duties."[119]

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

---

117 *See id.* at 10 ("The defendants have defined 'lack of fitness' as unsuitability for office demonstrated by specific facts related to the recall target's conduct in office.") (Appendix B); Transcript of Record at 5-6, *Citizens for Ethical Gov't v. State*, 3AN-05-12133CI (Alaska Super. Jan. 4, 2006) ("[T]he definitions . . . were taken from a prior case, . . . *Valley Residents* . . . [which] defined lack of fitness to be unsuitability for office demonstrated by specific facts related to the recall target's conduct in office . . . .") (Appendix C).

118 *See* Alaska Const. art. IX, § 6 ("No . . . appropriation of public money [shall be] made . . . except for a public purpose.").

119 *Coghill v. Rollins*, Memorandum Decision, 4FA-92-01728CI, at 21 (Alaska Super. Sept. 14, 1993) ("Incompetence for purposes of recall must relate to a lack of ability to perform the official's required duties.") (Appendix D).

For all the reasons set forth in this section, this court should determine that the allegation in Paragraph 2 of the recall petition states a valid ground for recall.

C. The Allegation That Governor Dunleavy Violated Separation-Of-Powers By Improperly Using The Line-Item Veto To Attack The Judiciary And The Rule Of Law States A Legally Sufficient Ground For Recall.

1. Factual basis for this claim

The Attorney General's opinion calls the allegation that the Governor "violated separation-of-powers by improperly using the line-item veto to attack the judiciary and the rule of law" "conclusory"[120]—but his opinion also indicates that the Attorney General (and therefore the Governor) knows *exactly* what specific conduct the recall application refers to.[121] As the opinion acknowledges, the full background is well-established by public sources.[122]

Governor Dunleavy prepared a proposed budget for FY 2020, which he submitted to the legislature for consideration during the 2019 legislative session. The Governor's proposed budget requested $7,106,400 for the appellate courts within the Alaska Court System.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

120 Att'y Gen. Clarkson Op. at 22 (Exhibit 2).

121 *See id.* at 23 n.104 ("One could assume that the allegation about attacking the judiciary refers to the widely reported veto message on the reduction to the Alaska Court System of $334,700, the stated purpose of which was to reduce the appropriation by the amount of the cost of state-funded elective abortions.").

122 There was already a court case filed challenging the court system veto before the recall application was even circulated. *See ACLU of Alaska v. Dunleavy*, Complaint for Declaratory and Injunctive Relief, 3AN-19-08349CI (July 17, 2019) (challenging the constitutionality of Governor Dunleavy's court system line-item veto).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

The Alaska legislature transmitted the operating budget it passed to the Governor on June 13, 2019.[123] The legislature's budget included the $7,106,400 that the Governor had requested for the appellate courts.[124] The legislature's budget also added 3% additional funding to equalize salaries for the appellate courts' employees to those of their counterparts in the executive branch.[125]

In the months between the Governor's proposal to fund the appellate courts and the legislature's approval of the amount the Governor requested, the Alaska Supreme Court issued its decision in *State v. Planned Parenthood of the Great Northwest*.[126] That decision held unconstitutional a regulation adopted by the Department of Health and Social Services ("DHSS") in 2013 and a statute passed by the legislature in 2014, both of which limited the availability of Medicaid funding for medically necessary abortions. The Supreme Court held that both the statute and regulation violated the constitutional guarantee of equal protection, because both applied a uniquely onerous definition of "medically necessary" as the standard for funding abortions for Medicaid-eligible women.[127] Under the statute and regulation, Medicaid-eligible women with medical conditions that made continuing a pregnancy dangerous to their health who chose nonetheless to continue their pregnancies qualified for Medicaid coverage of the health care needs their doctors deemed appropriate,

123 *See* 2019 House Journal 1217-18.
124 *See* ch. 1, § 1, at 38, 1SSLA 2019 (as amended).
125 *Id.*
126 436 P.3d 984 (Alaska 2019).
127 *See id.* at 990-91, 1000-04.

whereas women with the same condition who chose to terminate their pregnancies could not receive Medicaid coverage.[128]

The Supreme Court very explicitly limited its decision to medically necessary abortions. The decision does not in any way require the state's Medicaid program to pay for elective abortions. The Court expressly noted that, even under the prior, less restrictive definitions in statutes and regulations, "the legislative record contains no evidence that Medicaid had actually funded non-medically necessary abortions."[129]

Governor Dunleavy obviously did not like or agree with the Supreme Court's decision—nor did he understand it. On June 28, 2019, when he issued his line-item vetoes to the appropriations bill passed by the legislature, he reduced the funding to the appellate courts to provide $334,700 *less* than he originally had proposed and that the legislature had approved.[130] His veto message made clear that the *sole* reason for the reduction in the appellate courts' budget was his disagreement with the Supreme Court's decision in *State v. Planned Parenthood*. He wrote:

> The Legislative and Executive Branch are opposed to State funded elective abortions; the only branch of government that insists on State funded elective abortions is the Supreme Court. The annual cost of elective abortions is reflected by this reduction.[131]

---

128 *See id.* at 1003.

129 *Id.* at 1004.

130 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO CHANGE RECORD DETAILS at 122 (June 28, 2019) [hereinafter JUNE VETO CHANGE RECORD DETAILS], https://omb.alaska.gov/ombfiles/20_budget/FY20Enacted_cr_detail_6-28-19.pdf (Exhibit 14). Separately, in this first round of vetoes, the Governor also vetoed the 3% that the legislature had added to increase salaries for appellate court staff. *Id.* (Exhibit 14).

131 *Id.* (Exhibit 14). Governor Dunleavy apparently fails to understand that the Alaska Supreme Court is not, in and of itself, a "branch of government." Rather, it is the highest court of the Judicial Branch, which is comprised also of many other courts throughout Alaska.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

2. The line-item veto of a portion of the appellate courts' budget based on disagreement with a Supreme Court decision demonstrates the Governor's lack of fitness for his office.

As discussed above, "lack of fitness," as a standard for recall, is demonstrated when an official engages in a specific act that manifests unsuitability for office.[132] That test is easily met here. The sections that follow show, first, that the line-item veto based on disagreement with the Supreme Court decision demonstrates unfitness because the veto for that reason was illegal, and, second, that the veto demonstrates unfitness because it was unsuitable for the Governor to manifest such disdain and disrespect for a coequal branch of government performing its constitutional function.

a. The Governor's line-item veto of funding for the courts based on his disagreement with a judicial decision demonstrates his unfitness because it was an intentional illegal act in violation of the separation of powers.

The Alaska Constitution is organized "follow[ing] the traditional framework of American government," with authority distributed by the framers among three distinct branches of government—the executive, the legislative, and the judicial.[133] "The purposes of the separation of powers doctrine are to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government."[134] Respect for the constitutional separation of powers "prohibits one branch from encroaching upon and

---

132 *See supra* Subsection II.D.1 at 7-9.

133 *Alaska State-Operated Sch. Sys. v. Mueller*, 536 P.2d 99, 103 (Alaska 1975).

134 *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007) (citing *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976)).

exercising the powers of another branch."[135] Respecting the constitutional separation of powers ensures the checks and balances that prevent a "tyrannical" government.[136]

The Alaska Constitution assigns distinct powers to the three branches of government with respect to legislation. The executive and legislative branches, working together in prescribed ways, have the sole authority to enact laws;[137] but that authority is checked by—and is subordinate to—the power of the judiciary to determine the constitutionality of a law, which means the duty to void a law if it is unconstitutional.[138] With respect to enacting regulations, the legislature may grant such power to the executive branch,[139] but that authority, too, is checked by—and subordinate to—the judiciary's authority to determine that a particular regulation may not be applied because it is unconstitutional.[140] "Any

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

135 *Bradner*, 553 P.2d at 5 n.8 (citing *Myers v. United States*, 272 U.S. 52 (1926); *Giss v. Jordan*, 309 P.2d 779 (Ariz. 1957)).

136 *Id.* at 5 ("[T]he underlying rationale of the doctrine of separation of powers is the avoidance of tyrannical aggrandizement of power by a single branch of government through the mechanism of diffusion of governmental powers." (citing *Cont'l Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 410-11 (Alaska 1976))).

137 Alaska Const. art. II, §§1, 13-16; Alaska Const. art. III, §§ 1, 18.

138 *See* Alaska Const. art. IV, § 1; *Boucher v. Bomhoff*, 495 P.2d 77, 79 (Alaska 1972) ("Early in this country's jurisprudence it was established that we are a government of laws, not of men, and that the task of expounding upon fundamental constitutional law and its application to disputes between various segments of government and society rests with the judicial branch of government." (citing *Marbury v. Madison*, 5 U.S. 137 (1803))); *see also Marbury*, 5 U.S at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) ("Under Alaska's constitutional structure of government, 'the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.' " (quoting *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982))).

139 *See Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 586 (Alaska 1960).

140 *See State, Dep't of Fish & Game v. Manning*, 161 P.3d 1215, 1219-25 (Alaska 2007) (evaluating constitutionality of regulations).

attempt to undermine independent judicial review of agency action cannot be constitutional."[141]

When Governor Dunleavy vetoed a portion of the appellate court's funding because he disagreed with a Supreme Court decision on the constitutionality of both a statute and a regulation, he acted illegally and improperly in an attempt to "overrule" or undermine the decision requiring the Medicaid program to fund medically necessary abortions. He exercised the kind of arbitrary power and disrespect for the independence of another branch of government that the separation of powers doctrine forbids. The Governor's action, in refusing to acknowledge and respect the legitimacy of the Supreme Court's decision, violates the constitutional separation of powers.

It is clear that the Governor's line-item veto of a portion of the appellate courts' budget had nothing to do with a view on how much money the court system needs to operate or how much money the state can afford to provide to the court system. The Governor's veto message unambiguously stated that the only reason for the veto was an improper one—the Governor's disagreement with the Court's decision in the *Planned Parenthood* case.[142] The Governor's message was equivalent to saying to the courts, "I won't approve the funds you need unless you decide cases the way I want." If that type of action is tolerated, Alaska will cease to have a truly independent judiciary or three coequal branches of government. Jurists will be reduced to puppets who must render decisions to

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

141 *Alaska Pub. Interest Research Grp.*, 167 P.3d at 43.

142 *See* JUNE VETO CHANGE RECORD DETAILS at 122 (Exhibit 14).

please the executive, if they want to ensure the continued funding and operation of the judiciary.

b. The Governor's line-item veto based on a disagreement with the Supreme Court's decision demonstrates his unfitness because it was unsuitable for the Governor to display such disrespect for the power of the judiciary.

The line-item veto of $334,700 from the appellate courts' funding establishes the Governor's unsuitability for his office, even if the veto was not illegal. To be a suitable head of the executive branch, the Governor must demonstrate respect for the judiciary as a coequal branch of government when the judiciary does nothing more than act as it is constitutionally mandated to do. It is an abuse of power for the Governor to use the budgeting process as leverage to bully the courts to rule in a way the Governor will approve, and to pressure the judiciary to refrain from exercising independence in fulfilling its constitutional role as a check on the powers of the legislative and executive branches.[143]

3. The line-item veto based on a disagreement with the Supreme Court's decision demonstrates incompetence and neglect of duties.

The Governor's veto message, explaining why he struck $334,700 from the appellate courts' budget, rests on a flatly wrong characterization of the *Planned*

143 In speaking recently at the Alaska Federation of Natives convention, Chief Justice Bolger emphasized the importance of preserving an independent judiciary. *See* Alex DeMarban, *Alaska Supreme Court chief justice asks AFN to keep politics out of the judiciary*, ANCHORAGE DAILY NEWS, Oct. 19, 2019, https://www.adn.com/alaska-news/2019/10/18/alaska-supreme-court-chief-justice-wants-afn-to-help-keep-politics-out-of-the-judiciary/. "It's absolutely essential that judges maintain independence to make decisions based on the law and facts and not on political or personal considerations." *Id.* Chief Justice Bolger deplored the "great deal of political pressure" that the court system is receiving, and cited as one example that some people "would like to impose political consequences for the content of judicial decisions." *Id.*

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Parenthood decision. The Court explicitly did *not* require funding for any "elective abortions"; the decision unequivocally addresses funding only for medically necessary abortions.[144] The Court did nothing to undermine the executive and legislative branches' opposition to funding elective abortions.[145]

If the Governor contends that he mis-described the Supreme Court decision out of ignorance, rather than willfully mis-describing its holding, that would demonstrate incompetence—an inability to perform his duties. To fulfill his constitutionally-assigned role of enforcing the law, the Governor must understand the law. If he honestly did not understand the *Planned Parenthood* decisions, despite having access to an entire Department of Law that can explain judicial rulings to him, then the Governor is incompetent to perform the duties of his office.

Acting out of ignorance also demonstrates neglect of duties. To exercise his line-item veto authority consistent with his official duties, the Governor has a duty to act with reasonable care. That means he must take the time to understand what he is doing. If he vetoed $334,700 from the court system budget based on a misunderstanding of a Supreme Court decision, this demonstrates a clear neglect of duties.

Attorney General Clarkson's opinion recommends against certification of the recall application based on this allegation. In the Attorney General's view, there is essentially no

---

144 *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1001-05 (Alaska 2019).

145 The 2001 decision, which prompted the 2013 regulation and 2014 statute that redefined "medically necessary" for purposes of abortions, also only addressed medically necessary abortions. *See State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001) ("This case concerns the State's denial of public assistance to eligible women whose health is in danger. It does not concern State payment for elective abortions[.]").

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

limit on the Governor's line-item veto power.[146] This is wrong. While the Governor's power is broad, it is not unlimited. A simple analogy can be drawn to the right of an employer to terminate an at-will employee. Such an employer may fire the employee for almost any reason *except* for an unconstitutional reason. The same is true with the Governor. His discretion to reduce the judiciary's budget may be exercised for any reason *except* an unconstitutional reason or a reason that displays a refusal to accept the checks and balances of our three equal branches of government.[147]

The Governor left no doubt why he reduced the appellate courts' budget as he did. His message of disagreement with the Supreme Court's decision was precisely the point of the line-item veto. Because the Governor unambiguously used the line-item veto to attack the judiciary for performing its constitutional duty, the recall application states a legally sufficient ground for recall as a display of unfitness for office, neglect of duty, and/or incompetence.

D. The Allegation That Governor Dunleavy Violated Separation-Of-Powers By Improperly Using The Line-Item Veto To Preclude The Legislature From Upholding Its Constitutional Health, Education, And Welfare Responsibilities States A Legally Sufficient Ground For Recall.

1. Factual basis for this claim

After the legislature completed its annual budget process, Governor Dunleavy exercised his line-item veto power for FY 2020 on June 28, 2019.[148] The scope of

---

146 *See* Att'y Gen. Clarkson Op. at 22-23 (Exhibit 2).

147 *See Thomas v. Rosen*, 569 P.2d 792, 795 (Alaska 1975) (discussing the improper exercise of the line-item veto power as a violation of separation of powers).

148 *See* Press Release, Governor Michael J. Dunleavy, Dunleavy Serious About Balancing Budget, Eliminates 50 Percent of State Deficit (June 28, 2019),

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Governor Dunleavy's budget vetoes was substantial; he vetoed approximately $440 million, on top of $270 million in cuts already included in the appropriations bill.[149] Combined, the budget constituted a "nearly $680 million" reduction in state spending, representing more than 12% in overall cuts.[150]

Governor Dunleavy vetoed 182 specific programs to achieve these reductions.[151] With respect to health, Governor Dunleavy vetoed (at least)[152] $50 million in Medicaid funds.[153] He also eliminated adult dental Medicaid benefits by vetoing $27 million more for that program.[154] And he vetoed over $6 million in behavioral health treatment and recovery grants.[155]

With respect to education, Governor Dunleavy vetoed more than $130 million from the University of Alaska, over 44% of its state support.[156] He reduced the state's school bond debt reimbursement—the state's payments for education bonds—by 50% (nearly $49 million).[157] Governor Dunleavy also completely eliminated pre-kindergarten funding (over $8.8 million) in the form of grants for Head Start, Parents as Teachers, Early

---

https://gov.alaska.gov/newsroom/2019/06/28/dunleavy-serious-about-balancing-budget-eliminates-50-percent-of-state-deficit/.

149 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2020 ENACTED BUDGET (June 28, 2019) (updated June 15, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/FY2020_Enacted_Summary_7-15-19.pdf (showing $434,615 million in total "veto actions").

150 *Id.*

151 *See* JUNE VETO CHANGE RECORD DETAILS.

152 *See infra* Section III.E at 48-53.

153 JUNE VETO CHANGE RECORD DETAILS at 60.

154 *Id.* at 61.

155 *Id.* at 49.

156 *See id.* at 121.

157 *Id.* at 137.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

Childhood, and Best Beginnings.[158] And he eliminated funding for the Online With Libraries (OWL) and Live Homework Help programs, which provide internet access to rural Alaskan schools as well as online tutoring services.[159]

With respect to welfare, Governor Dunleavy vetoed over $21 million to eliminate the senior benefits payment program, which provides assistance to low-income seniors.[160] He vetoed $3 million in Village Public Safety Officer (VPSO) funding.[161] Governor Dunleavy also eliminated funds ($2 million) for a youth detention and treatment facility in Nome.[162] And he vetoed over $750,000 for Alaska Legal Services Corporation[163]—the equivalent of all funding to assist victims of domestic violence—and over $575,000 for the Public Defender Agency,[164] two organizations that provide legal services to low-income Alaskans.

After failing to override Governor Dunleavy's vetoes in a 37-1 vote,[165] the legislature passed a new $375 million appropriations bill to restore most of the vetoed

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

158 *Id.* at 19.
159 *Id.* at 28-29.
160 *Id.* at 55; STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, FY2019 SUPPLEMENTAL VETOES at 3 (June 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/FY2019_Supplemental_Vetoes_6-28-19.pdf.
161 JUNE VETO CHANGE RECORD DETAILS at 80.
162 *Id.* at 52.
163 *Id.* at 8.
164 *Id.* at 7.
165 Alaska Const. art. II, § 16 ("Bills to raise revenue and appropriation bills or items, although vetoed, become law by affirmative vote of three-fourths of the membership of the legislature."). The remaining 22 legislators were in Wasilla, not Juneau, for the vote.

funds.[166] Recall Dunleavy began gathering signatures for its recall application on August 1, 2019, with the application language at issue in this case.

Governor Dunleavy exercised his line-item veto power on the second appropriations bill on August 19, 2019.[167] His second wave of line-item vetoes reduced the new appropriations bill by $220 million.[168]

As to certain programs, Governor Dunleavy reversed course and allowed the reinstated funding to stand.[169] Included in this reversal were: (1) $110 million of previously-vetoed funds for the University of Alaska; (2) over $21 million for the senior benefits program; (3) nearly $9 million in grants for early childhood education; (4) funds to continue the OWL and Live Homework Help programs; and (5) over $750 thousand for Alaska Legal Services Corporation.[170]

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

166 *See* Press Release, Governor Michael J. Dunleavy, Governor Dunleavy Announces Final Piece of FY20 Budget (Aug. 19, 2019), https://gov.alaska.gov/newsroom/2019/08/19/budget_pfd/.

167 *See id.*

168 *See id.*

169 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, HOUSE BILL 2001 – FY2020 RESTORED ITEMS, PRESS BRIEFING – ITEMS OF INTEREST (Aug. 19, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/HB2001_Press_Restored_Items_of_Interest_8-19-19.pdf. Although Governor Dunleavy characterized this reversal as a situation where he "restored" funding for certain programs, the legislature is the branch of government which actually restored funding for these programs.

170 *Id.*

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

2. Governor Dunleavy's line-item vetoes constitute neglect of duties.

The Alaska Constitution, unlike the United States Constitution, provides affirmative rights to its citizens in the areas of health,[171] education,[172] and welfare.[173] Although the exact contours of these rights have not been completely defined by the Alaska Supreme Court,[174] it is clear that some level of "minimal adequacy" is required.[175]

The legislature has the power to appropriate funds, and, although the Governor has the power to reduce those funds through a line-item veto, the Governor's line-item veto authority is not absolute.[176] For example, a Governor cannot veto intent language, because that would unconstitutionally infringe on the legislature's appropriation power.[177] And the

---

171 Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health.").

172 Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State . . . .").

173 Alaska Const. art. VII, § 5 ("The legislature shall provide for public welfare.").

174 *See State v. Ketchikan Gateway Borough*, 366 P.3d 86, 103 (Alaska 2016) (Winfree, J., concurring) ("[A]rticle VII, section 1's mandate . . . 'imposes a [constitutional] duty upon the state legislature, and it confers upon Alaska school age children a [constitutional] right to education.' " (third and fourth alterations in original) (quoting *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 799 (Alaska 1975))).

175 *Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d 391, 405 (Alaska 1997) (Matthews, J., joined by Rabinowitz, J., concurring); *see also* Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 596 (1989) ("[Some constitutions] include[] provisions that do not merely authorize the state to provide for the poor, but instead refer to a governmental obligation to care for the needy or protect the health of all citizens. . . . The Alaska Constitution states simply but clearly that the legislature 'shall provide for public welfare.' " (quoting Alaska Const. art. VII, § 5)); William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 557 (1998) ("The Alaska Constitution directs the legislature to provide for public welfare, without defining either what assistance is necessary to meet this command or who should get the assistance. Something, however, is required." (footnote omitted)).

176 *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) (citing Alaska Const. art. II, §§ 13, 15).

177 *See id.* at 371-73.

line-item veto power cannot be used to violate the separation of powers,[178] or impermissibly encroach on a constitutionally-mandated legislative appropriation.[179]

Because the legislature has a constitutional duty to provide for the health, education, and welfare of Alaska's citizens,[180] the Governor cannot constitutionally wield his veto power to preclude the legislature from fulfilling that duty. These constitutional provisions cannot be meaningless; there must be *some* legislative obligation to provide for health, education, and welfare that mandates a certain level of funding and support. For example, the Governor could not veto the entire budget for the Department of Public Safety ("DPS") without interfering with the legislature's constitutional duty to provide for the welfare of all Alaskans. Although the entire DPS budget was not vetoed, the voters could find that the Governor's sweeping vetoes decimated so many important programs as to rise to the

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

178 *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (characterizing a decision regarding the Governor's line-item veto power as a "great constitutional moment" which "pits the political branches of our state government in a fundamental separation of powers confrontation").

179 *See Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006) (recognizing "the tension 'between a desire to prevent legislatures from using appropriation bills to make programmatic changes . . . and the realization that legislatures do not have to fund or fully fund any program (*except*, possibly, *constitutionally mandated programs*)' " (first alteration in original) (emphasis added) (quoting *Alaska Legislative Council*, 21 P.3d at 378)).

180 Alaska Const. art. VII, §§ 1, 4, 5; *Suber v. Alaska State Bond Comm.*, 414 P.2d 546, 552 (Alaska 1966) ("Relief and support of the poor has long been recognized as an obligation of government and a public purpose." (citing *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 515 (1937); *Roe v. Kervick*, 199 A.2d 834, 846 (N.J. 1964))); *see Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) ("We presume that [the constitutional convention delegates] 'intended every word, sentence or provision . . . to have some purpose, force, and effect, and that no words or provisions are superfluous.' " (quoting *State, Dep't of Commerce, Cmty. & Econ. Dev. v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 629 (Alaska 2007))); *see also Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) ("Our analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. We are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result." (alteration in original) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994))).

level of threatening the legislature's affirmative obligations to provide for the health, education, and welfare of all Alaskans. In severely impairing the legislature's efforts to fulfill its constitutional responsibilities, the Governor went beyond the legitimate exercise of his veto power and breached his duty to respect the legislature's role to fund core government services.

3. Governor Dunleavy's line-item vetoes demonstrate lack of fitness and incompetence.

Governor Dunleavy's far-reaching, devastating vetoes in June also displayed his lack of fitness for office and his incompetence. Both are evidenced by his second round of vetoes in August, and the accompanying press release, where he reversed course and permitted the restoration of $156 million in funds.[181] Governor Dunleavy repeatedly characterized his June vetoes as merely having started a "conversation," implying that he never intended to follow through and that the "conversations" that changed his mind could not have happened without the vetoes.[182]

By waiting to analyze or discuss the effect of his planned vetoes until *after* they were made, Governor Dunleavy displayed his unsuitability for his office and his failure to function as an effective leader. The Governor acted before he listened or understood the impact of his actions. Treating his first round of vetoes as a "conversation starter" demonstrates a lack of fitness and a level of incompetence sufficient to be a valid ground

---

[181] *See* Press Release, Governor Michael J. Dunleavy, Governor Dunleavy Announces Final Piece of FY20 Budget (Aug. 19, 2019), https://gov.alaska.gov/newsroom/2019/08/19/budget_pfd/.

[182] *See id.*

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

for recall. After all, if the legislature had not cleaned up his mess by restoring vetoed funds, he never would have had a chance to "allow" those restorations to stand. Alaskans would have suffered—some could have perished—all for the sake of the Governor's "conversation." Because the voters could find that Governor Dunleavy is unsuited for office and incompetent in how he went about exercising his veto power in June, Plaintiff has articulated valid grounds for recall under the lack of fitness and incompetence prongs.

The Attorney General's recommendation has two responses to this allegation that apply to all grounds for recall.[183] First, he asserts that this allegation is too vague and fails to state a ground with sufficient particularity that the Governor could respond to.[184] But there is no question that the Governor should understand the allegation to be that his vetoes went so far as to interfere with the legislature's constitutional duties to provide for health, education, and welfare. The Attorney General seems to suggest that Plaintiff needed to identify particular cuts. The allegation, however, is that his vetoes *in total* went so far as to violate the Alaska Constitution. The Governor has sufficient notice of this ground.

Second, the Attorney General asserts that the Governor's vetoes are purely discretionary policy choices and that there is no constitutional limit whatsoever to his veto power. This is simply not true. As outlined in detail above, the line-item veto power cannot

183 *See* Att'y Gen. Clarkson Op. at 22-23 (Exhibit 2).
184 *See id.* (Exhibit 2).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

be used to violate the separation of powers,[185] or impermissibly encroach on a constitutionally-mandated legislative appropriation.[186]

In deciding whether there is a permissible ground for recall, this court does not need to decide whether Governor Dunleavy's vetoes actually violated separation of powers by treading on the legislature's affirmative duties to provide for the health, education, and welfare of Alaskans. This court must instead determine whether, assuming all of the facts alleged are true, a valid legal claim is stated.[187] It is for the voters to decide whether the Governor's vetoes interfered with the legislature's constitutional duty to fund education, health, and welfare of Alaskans. The application articulated a valid legal ground for recall.

E. The Allegation That Governor Dunleavy Acted Incompetently When He Mistakenly Vetoed $18 Million More Than He Intended To Strike States A Legally Sufficient Ground For Recall.

1. Factual basis for this claim

Governor Dunleavy vetoed approximately $440 million on June 28, 2019.[188] Included were two multi-million dollar cuts to Medicaid—a surprise to his own DHSS[189]—

185 *See Thomas*, 569 P.2d at 795.

186 *See Simpson*, 129 P.3d at 447.

187 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 301 (Alaska 1984) ("If the [recall] petition alleges violation of totally non-existent laws, then it would not allege failure to perform prescribed duties. But . . . [w]here the petition merely characterizes the law in a way different than the official (or his or her attorney) would prefer, he or she has an opportunity to put his or her rebuttal before the voters, alongside the charges contained in the petition.").

188 *See* Press Release, Governor Michael J. Dunleavy, Dunleavy Serious About Balancing Budget, Eliminates 50 Percent of State Deficit (June 28, 2019), https://gov.alaska.gov/newsroom/2019/06/28/dunleavy-serious-about-balancing-budget-eliminates-50-percent-of-state-deficit/.

189 Excerpts from Affidavit of Donna Steward, Deputy Comm'r, Medicaid & Health Care Policy, Alaska Dep't of Health & Soc. Servs., ¶ 22 (Aug. 2, 2019) [hereinafter Donna Steward Aff.] ("The department was unaware that the governor would be reducing the Medicaid budget by an additional $50 million when these regulations were adopted [on the same day as the vetoes].

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

which Governor Dunleavy thought totaled just over $77 million.[190] He vetoed $50 million as part of a general Medicaid services reduction,[191] and vetoed an additional (roughly) $27 million with the intent to eliminate adult dental Medicaid benefits.[192] These specific numbers were included in Governor Dunleavy's Veto Change Record of Details,[193] as well as in his Veto Summary.[194]

But Governor Dunleavy actually vetoed significantly more Medicaid funds than he intended. Medicaid appropriations in the state's budget include monies in the state's general fund and also federal dollars that the state expects to receive for this federal program.[195] State Medicaid funds are matched by the federal government at varying rates.[196] Therefore, an understanding of the federal matching rate in a specific area of Medicaid spending is required to achieve an overall desired reduction in state Medicaid spending.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

The additional cuts to Medicaid due to the governor's vetoes on July 28, 2019, are currently being evaluated.") (Exhibit 15).

190 *See* JUNE VETO CHANGE RECORD DETAILS at 60-61.

191 *Id.* at 60.

192 *Id.* at 61.

193 *Id.* at 60-61.

194 STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, VETO SUMMARY at 5 (June 28, 2019) [hereinafter JUNE VETO SUMMARY], https://omb.alaska.gov/ombfiles/20_budget/PDFs/Gov_Op_&_MH_Veto_Summary_6-28-19.pdf.

195 *See* Hearing on Budget and Fiscal Review and Updates Before S. Fin. Comm., 31st Leg., 2d Spec. Sess. 09:41:55-09:43:03 (July 9, 2019) [hereinafter David Teal Testimony], http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202019-07-09%2009:00:00#tab2_4e (testimony of David Teal, Director of Legislative Finance).

196 *See* Donna Steward Aff. at ¶ 18 ("The Medicaid program is a joint federal/state program that requires funding from both parties. The general split of funding is 50/50 but depending on the recipient or services provided, more funding may be available from the federal side, that is, more federal money is allocated to split than state dollars.") (Exhibit 15).

There is no question that Governor Dunleavy wanted to eliminate adult dental Medicaid benefits in Alaska.[197] Two of his veto budget documents correctly accounted for the two-to-one federal match for that service.[198] But his actual veto did not.[199] To achieve an overall reduction of $27,004,500 to eliminate the program, Governor Dunleavy should have vetoed $8,273,600 in state funds and $18,730,900 in federal funds to achieve his stated intent.[200]

But instead of vetoing $8,273,600 in state funds to achieve an overall reduction of $27,004,500 in Medicaid funds, Governor Dunleavy vetoed $27,004,500 in *state* funds.[201] This means Governor Dunleavy vetoed over $18.7 million in state Medicaid funds beyond what he needed to eliminate adult dental benefits.[202] Because line-item vetoes are binding unless overridden,[203] Governor Dunleavy's uncorrected mistake would have caused the state to lose an additional $18.7 million in state Medicaid dollars—as well as a substantial, unknown amount of federally-matched dollars—if he had not been given a second chance to address this veto. Conservative estimates put that additional loss of federal funds at

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

197 JUNE VETO CHANGE RECORD DETAILS at 61; JUNE VETO SUMMARY at 5.
198 JUNE VETO CHANGE RECORD DETAILS at 61; JUNE VETO SUMMARY at 5.
199 *See* ch. 1, § 1, at 20-21, 1SSLA 2019 (as amended) (Exhibit 16).
200 JUNE VETO CHANGE RECORD DETAILS at 61; JUNE VETO SUMMARY at 5.
201 Ch. 1, § 1, at 20-21, 1SSLA 2019 (as amended) (Exhibit 16).
202 *See* David Teal Testimony, *supra* note 195.
203 *See Wielechowski v. State*, 403 P.3d 1141, 1152-53 (Alaska 2017) (looking to the enacted appropriations bill, as amended, to determine line-item vetoes).

roughly $40 million,[204] *the equivalent of over 10,000 Alaskans completely losing their Medicaid benefits*.[205]

Luckily for Alaska's Medicaid recipients, the legislature gave the Governor the opportunity to correct his error. In a special session, the legislature restored Medicaid funding for adult dental benefits, which put this issue before the Governor a second time. Responding to the second appropriations bill, Governor Dunleavy vetoed the correct $8,273,600 in state funds to achieve his stated desired goal of eliminating the program on August 19, 2019.[206] In a lengthy explanation, Governor Dunleavy admitted that he kept "$18,730,900 in [state] general funds that . . . [he] never intended to be vetoed" back in June.[207]

2. Governor Dunleavy's mistaken Medicaid veto demonstrated incompetence.

Governor Dunleavy's mistaken veto of over $18.7 million in federally-matched state Medicaid funds is a clear demonstration of incompetence. And the mistake was not

---

204 *See cf.* EVERGREEN ECONS., LONG-TERM FORECAST OF MEDICAID ENROLLMENT AND SPENDING IN ALASKA: FY2019-FY2039, at 6 (Sept. 25, 2018) [hereinafter EVERGREEN ECONS.], http://dhss.alaska.gov/fms/Documents/AK%20LongTermMedicaidFcast_MESA%20FY2019%20to%20FY2039.pdf ("project[ing] federal participation will be approximately 67 percent [in FY2020.]").

205 *See id.* at 2, 5, 16 (showing the average Medicaid enrollee receives care costing just under $10,000 per year in Alaska). In other words, a $40 million loss in funds would remove funding equivalent to the amount necessary to cover roughly 4% of Alaska's currently-enrolled Medicaid population. *See id.* at 2, 25.

206 Ch. 2, § 1, at 5, 2SSLA 2019 (as amended) (Exhibit 17).

207 *See* STATE OF ALASKA, OFFICE OF MGMT. & BUDGET, HB 2001 FY20 POST-VETO CHANGE RECORD DETAIL at 27 (Aug. 19, 2019) [hereinafter AUGUST VETO CHANGE RECORD DETAIL], https://omb.alaska.gov/ombfiles/20_budget/PDFs/FY20_HB2001_Post_Veto_CR_Detail_8-19-19.pdf ("[U]pon advice from [the] Department of Law, . . . I have . . . maintain[ed] the $18,730,900 in general funds that were never intended to be vetoed . . . .") (Exhibit 18).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

trivial; the impacts of this multimillion-dollar mistake could have been devastating to the more than 10,000 Alaskans who might not have been able to obtain Medicaid benefits.[208]

Governor Dunleavy has attempted to downplay this grievous mistake by refusing to directly admit to it.[209] But Governor Dunleavy did make this mistake, shown by his own admission,[210] and by his leaving the correct amount of previously-vetoed funds in a subsequent appropriations bill.[211] His multimillion-dollar mistake shows an "[in]ability to perform . . . required duties,"[212] and is thus a demonstration of incompetence sufficient to establish a ground for recall.

3. Governor Dunleavy's mistaken Medicaid veto demonstrated lack of fitness and neglect of duty.

Governor Dunleavy's mistaken Medicaid veto also establishes that he neglected to perform his duty as Alaska's chief executive, and it demonstrates lack of fitness through his inappropriate, uninformed behavior. DHSS, a department within his own administration, was blindsided by Governor Dunleavy's extensive Medicaid vetoes.[213] Governor Dunleavy easily could have avoided his error if he had consulted with DHSS before making his line-item vetoes. An executive who makes such dramatic funding choices, without consulting impacted agencies—and without considering the impact to tens

208 *See* EVERGREEN ECONS. at 2, 5, 16, 25.

209 *See* AUGUST VETO CHANGE RECORD DETAIL at 27 (Exhibit 18).

210 *See id.* ("[U]pon advice from [the] Department of Law, . . . I have . . . maintain[ed] the $18,730,900 in general funds that were never intended to be vetoed . . . .") (Exhibit 18).

211 Ch. 2, § 1, at 5, 2SSLA 2019 (as amended) (Exhibit 17).

212 *See Coghill v. Rollins*, Memorandum Decision, 4FA-92-01728CI, at 23 (Alaska Super. Sept. 14, 1993) ("Incompetence for purposes of recall must relate to a lack of ability to perform the official's required duties.") (Appendix D).

213 *See* Donna Steward Aff. at ¶ 22 (Exhibit 15).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

of thousands of Alaskans—acts inappropriately and is incompetent and unfit for the office. The application states sufficient legal grounds of neglect of duties, incompetence, and lack of fitness based on the mistaken Medicaid veto.

The Attorney General's recommendation against certification concedes the Governor's mistake, but calls it a "scrivener's error" without legal impact.[214] But there is no "scrivener's error" exception to any of the statutory grounds for recall. Recall Dunleavy has therefore made a prima facie case of incompetence. The Governor may make the arguments that the Attorney General advances as part of his rebuttal, but the availability of defenses does not mean the recall application fails to state a valid ground.

IV. CONCLUSION

Because the power to recall public officials is fundamentally a part of our political process, the "statutes relating to . . . recall, like those relating to the initiative and referendum, 'should be liberally construed so that "the people [are] permitted to vote and express their will . . . ." ' "[215] Attorney General Clarkson's recommendation resulting in the rejection of Recall Dunleavy's application is a textbook example of how to create "artificial technical hurdles" designed to stymie the recall process.[216] Ignoring case law, prior Attorney General opinions addressing recalls, and the Alaska Supreme Court's direction to liberally construe recall statutes, Attorney General Clarkson unlawfully

214 *See* Att'y Gen. Clarkson Op. at 23-25 (Exhibit 2).

215 *Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 296 (Alaska 1984) (second and third alterations in original) (quoting *Boucher v. Engstrom*, 528 P.2d 456, 462 (Alaska 1974)).

216 *Id.* (citing *Hazelwood v. Saul*, 619 P.2d 499, 500-01 (Colo. 1980); *Westpy v. Burnett*, 197 A.2d 400, 404 (N.J. Super. Ct. App. Div. 1964)).

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

recommended denying the application by ratcheting up and narrowing the meanings of the grounds—lack of fitness, incompetence, and neglect of duties—as well as the requirement that the grounds be "described in particular in not more than 200 words."[217]

If this administration sees fit to change recall law, it can seek a legislative change. But as with initiatives, "the sponsors . . . have relied on [court] precedents in preparing the present [application] and undertaking the considerable expense and time and effort needed to place it on the ballot."[218] Defendants cannot be allowed to defeat the recall by changing the rules of the game *after* the application was submitted.

Each of the five allegations in the recall application states three legally sufficient grounds for recall of Governor Dunleavy: lack of fitness, incompetence, and neglect of duties. So long as an allegation meets one of these three grounds, it is properly included in the application. Upon completion of the review for legal sufficiency, this court should certify the recall application as submitted, and order the immediate distribution of recall petition booklets to Recall Dunleavy.

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

217 AS 15.45.500(2).

218 *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1180-81 (Alaska 1985).

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 27 day of November 2019.

HOLMES WEDDLE & BARCOTT, PC

By: _____

Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099

SUMMIT LAW GROUP

Jeffrey M. Feldman
Alaska Bar No. 7605029

REEVES AMODIO

Susan Orlansky
Alaska Bar No. 8106042

Attorneys for Plaintiff Recall Dunleavy

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of November 2019, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

Margaret Paton-Walsh
Attorney General's Office
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
margaret.paton-walsh@alaska.gov

Craig Richards
Law Office of Craig Richards
810 N Street, Ste 100
Anchorage, AK 99501
crichards@alaskaprofessionalservices.com

Brewster H. Jamieson
Michael B. Baylous
Lane Powell LLC
1600 A Street, Ste 304
Anchorage, AK 99501
jamiesonb@lanepowell.com
baylousm@lanepowell.com

Brian Fontaine